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In The

Supreme Court of the United States

October Term, 1995

LAURENCE M. POWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The United States contends the circuit court correctly applied a de novo standard of review of the downward departures in this case and correctly found that all of the factors used by the district court were invalid factors.

The Government devotes a great deal of argument to its contention that appellate review of departures involve questions of law that call for a de novo standard of review.

In the abstract, of course, this Court has already held that sentencing appeals, in general, and departure appeals, in particular, involve questions of law. *Williams* v. *United States*, 503 U.S. 193 (1992).

Indeed, 18 U.S.C. § 3742(e) explicitly addresses sentences that are "imposed as a result of an incorrect application of the sentencing guidelines" or are "outside the applicable guideline range."

But, neither *Williams* nor Section 3742(e) support the Government position that where, as here, downward departures are based either on a ground that is specifically authorized by the Guidelines (victim provocation), or on a combination of factors not explicitly taken into account in the Guidelines (susceptibility to abuse in prison; unfair repetitive prosecution; the lack of danger to the community), the standard of appellate review is, or should be de novo.

In this Reply Brief, Petitioner Powell contends that when the Court is reviewing a departure under an authorized or encouraged basis for downward departure, Section 3742(e) requires a two-step process. First the

reviewing court must determine whether the ground for departure *could* legally be applied in a case of the sort before the court, and (if so), the court must then "accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." Petitioner contends this statutory mandate to the reviewing court applies the "due deference" standard to facts impliedly and explicitly found by the district court, and requires the reviewing court to defer to the district court's application of the downward departure guideline to the case unless the facts impliedly or explicitly found are clearly erroneous.

Where the departure is based on a factor or combination of factors not taken into account in the Guidelines, the reviewing court must first determine whether the district court erred, as a matter of law, in its conclusion that the Guidelines did not take the factor (or combination of factors) into account, or did not prohibit departure on that basis. If the district court did not err in that determination, then the same second step is mandated by Section 3742(e), last paragraph.

The Government makes several specific arguments Petitioner responds to, regarding particular sub-issues presented.

Finally, applying the above rules to the facts of this case, Petitioner concludes: (1) the District Court did not err as a matter of law in applying the victim misconduct downward departure guideline to a case of this type; (2) giving due deference to the district court's explicit and

implicit factual findings, none of which were clearly erroneous, the departure for victim misconduct in this case is reasonable and must be upheld; (3) while lack of recidivism is a factor which is individually prohibited as a basis for departure, where, as here, the defendant is in criminal history category I, neither "added punishment" due to the defendant's unusual susceptibility to abuse in prison, nor the additional punishment flowing from the successive prosecutions of the defendant for the same conduct are prohibited bases for downward departure, and neither are taken into account in the guidelines, and both are arguably related to the purposes of punishment mentioned in 18 U.S.C. § 3553(a)(2), so, in combination, they do not constitute an illegal, or invalid basis for departure; (4) applying the "due deference" standard found in the last paragraph of § 3742, the district court's three-level departure on this combined basis, although "outside the applicable guideline range"[1] is not unreasonable in light of the factors enumerated in 18 U.S.C. § 3553(a)(1)-(7) or the reasons stated by the district court and it must, also, be upheld.

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[1] This is the legal question on appeal identified in 18 U.S.C. § 3742(e)(3).

> "Upon review of the record, the court of appeals shall determine whether the sentence – (3) is outside the applicable guideline range, and is unreasonable, having regard for – (A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of 3553(c)."

ARGUMENT

On some level, it is clear a reviewing court is always entitled to determine whether or not the trial court correctly applied the law to the facts of the case.

A substantial portion of the Government's Brief ("Govt.") appears to be devoted to this proposition. It is also clear that if, e.g., a district court departs on the basis of a factor the Guidelines specifically state is a prohibited basis for departure, that would constitute an invalid basis of departure, as a matter of law, under 18 U.S.C. § 3742(e)(2).

Section 3742(e) governs review of district court sentencing decisions, and sets forth two standards that are non-controversial and appear to be legal standards appropriate for "de novo" review.

> "**(e) Consideration.** – Upon review of the record, the court of appeals shall determine whether the sentence –
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
>
> (3) is outside the applicable guideline range, and is unreasonable, having regard for –
>
> (A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and
>
> (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

* * *

> The Court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." [Excerpt, § 3742]

Under this statute, when the Court imposes a sentence that is lower than a statutory mandatory minimum sentence, the sentence was "imposed in violation of law" pursuant to § 3742(e)(1). This is clearly a question of law, and de novo review is appropriate.

Similarly, when the district court intends to sentence within the appropriate guideline range, but errs in applying the guidelines to the facts, that error would appear to be an error of law, and after accepting the district court's findings of fact, which were not clearly erroneous; a de novo review of the application of the law to those facts would be required under Section 3742(e)(2).

Finally, since any departure is "outside the applicable guideline range" by definition, Section 3742(e)(3) would appear to apply.[2] This conclusion seems consistent with

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[2] Counsel is mindful of Justice O'Connor's opinion in *Williams* v. *United States, supra*, wherein it was held that the use of an invalid departure ground is an "incorrect application of the guidelines" however, that conclusion seems apt when the departure used is one that the Guidelines actually address – than where the question is whether or not the factor is taken into account by the Guidelines. Here, e.g., the downward departure of five levels was for victim misconduct, under U.S.S.G., Section 5K2.10 was more obviously an application of the Guidelines to

the use of language in 18 U.S.C. § 3553(b) which requires a sentence "within the range" unless there is present an aggravating or mitigating circumstance not taken into account, on the basis of which departure is justified.

Given this statutory scheme governing appellate review of sentences imposed by the district court, it seems clear that, contrary to the Government's conclusion, a two step approach is required.

In the case of a basis of departure that is explicitly authorized by the Guidelines, such as victim misconduct (U.S.S.G. § 5K2.10), the reviewing court must, of course, determine whether, as a matter of law, that Guideline could apply to the case before it. If, for example, the trial court departed downward for victim misconduct, in a case in which there was no victim, de novo review would enable the reviewing court to conclude, as a matter of law, that the district court departed on the basis of an invalid factor. If, on the other hand, the case is one in which, legally, a downward departure could be based on victim misconduct, the language of Section 3742(e) appears to mandate the reviewing court to give "due deference to the district court's application of the guidelines to the facts."

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the facts, than was the court's 3-level departure for a combination of non-prohibited factors. Nevertheless, Petitioner's analysis incorporates the holding of *Williams* that a departure is an application by the district court of the Guidelines to the facts of the case.

Here, Petitioner Powell has argued that since there was a victim, and since one major element of the sentencing formula under the Guidelines was the offense conduct constituting assault, and in any event it was a violent offense, U.S.S.G. § 5K2.10 can legally apply to this case.

The policy statement applicable to this basis for departure states in relevant part:

> "Victim misconduct ordinarily would not be sufficient to warrant applications of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses."

The Guidelines say nothing about "ordinary" misconduct of the victim of a violent offense, and they do not mention civil rights cases as a type of violent offense to which this type of departure would ordinarily not be applicable.

Contrary to the Government's (and the circuit court's) conclusion that this guideline authorizing downward departure for victim misconduct in cases of violent offenses would not apply in the case of "ordinary" victim misconduct, Petitioner contends the plain language of the Guideline section itself precludes a finding that the district court erred as a matter of law in applying this guideline to this case.

Moreover, the second step mandated by Section 3742 – reviewing the district court's application of the guideline to the particular facts of the case – is not a de novo review since that review must be undertaken with due

deference for the district court's findings of fact, and with "due deference to the district court's application of the guidelines to the facts."

The government suggests that a careful review of the district court's explicit findings involve a second error of law, since they do not state that the victim misconduct actually provoked the offense behavior.[3]

But, the Guideline itself (Section 5K2.10) does not require such a direct link. It merely states that the victim's wrongful conduct "contributed significantly to provoking the offense behavior."[4]

The Government seems to suggest that the victim misconduct must come at the precise point in time that the offense behavior occurs. This is not a fair reading of the Guideline, nor is it the way the Guideline was interpreted in *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989) discussed at length in the Opening Briefs.

The language of the Guideline *does* however suggest that the court should look to the offense *conduct* rather than the charge offense when determining whether to depart downward based on victim misconduct, since it specifically describes the relationship between the misconduct and the "offense behavior." Petitioner argued in the opening brief that the Commission specifically

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[3] Indeed, the Guideline does describe a necessary relationship between the misconduct and the offense behavior.

[4] Nor can there be any doubt that the District Court's departure in this case included implied findings sufficient to meet the government's test – that the victim misconduct provoked the offense conduct.

intended that where an offense is a violent offense, and where the sentence has an element based on assaultive conduct, the Guideline for that element of the sentence may overstate the seriousness of the crime where victim misconduct substantially contributes to provoking that assaultive conduct. The Government's response that civil rights offenses are "both different from and more serious than the underlying conduct by itself" (Govt. p. 46) is not a persuasive reason for accepting the conclusion that this guideline does not permit downward departure if there is victim misconduct in a civil rights case.

First, it is clear that the degree to which a civil rights case is more serious than the underlying aggravated assault is reflected by the Guidelines sentence which adds additional levels to the sentence because of the civil right violation to the offense level given for aggravated assault. Second, and perhaps more important, the departure in this case for victim misconduct which was 5 levels did not exceed the 15 levels in the guidelines sentence that were based on the offense conduct of aggravated assault. The remaining levels attributable to, and reflecting the fact that a civil rights violation is more serious than an ordinary aggravated assault remained intact on the district court's analysis of this departure issue.

In other words, the applicable guideline sentence is made up of various elements. Fifteen levels of that sentence are solely for aggravated assault, which was added to the offense level of 6 for the civil rights violation. The "base" offense level in this case was thus based on a combination of two elements – the civil rights violation element and the aggravated assault element.

The 5-level downward departure applied by the district court was for victim misconduct that substantially contributed to provoking the offense conduct of aggravated assault. That departure left intact the additional 6-levels in the Guidelines sentence that specifically respond to the difference and greater seriousness of this offense (civil rights violation) when compared to ordinary aggravated assault. Had the downward departure been applied to an ordinary aggravated assault case, the resulting offense level[5] would have been 10, where as here, because this was a civil right violation the resulting offense level[6] was 16.

Nothing in the Guidelines, or the sentencing statute supports the conclusion that a reviewing court may determine that certain victim misconduct is "ordinary" and therefore ineligible for the departure. In fact, it is clear that civil rights violations need not involve violent offense conduct at all, and there is no reason to believe that when they do, victim misconduct is irrelevant to the ultimate sentencing decision of the district court.

The Government's suggestion that "although ordinary victim misconduct does not warrant a departure in an excessive force case, unusual victim misconduct would be a candidate for departure" (Govt. p. 47) finds no support in the Guidelines or in logic.

Rather than engaging in a review of the departure with due deference to the district court's application of

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[5] Exclusive of adjustments for use of a weapon and injury, which are the same in either case.

[6] Exclusive of the other adjustments.

the guidelines to the facts of this case, the government has created from whole cloth a new legal requirement that precludes the application of U.S.S.G., Section 5K2.10 unless the record discloses "unusual victim misconduct." But the government's approach ignores the fact that the Commission specifically identified "victim misconduct" as an authorized basis for departure in violent offense conduct cases, and attempts to engraft general "heartland" principles onto this explicit section of the guidelines. Nothing in statutory law, or the guidelines themselves supports this approach.

Applying 18 U.S.C. § 3742(e) to this departure, giving the mandated "due deference" to the district court's application of U.S.S.G. § 5K2.10 to the facts of this case, the 5-level downward departure for victim misconduct must be affirmed.[7]

Similarly, an application of Section 3742(e) to the present case rebuts the government's contention that the circuit court should review de novo a particular departure decision when it is based on a combination of factors.

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[7] The Government concedes that 18 U.S.C. § 3742(e) requires appellate courts to accept district court findings of fact unless they are clearly erroneous, and to "give due deference to a district court's application of the guidelines to the facts." Yet the Government completely ignores this "due deference" requirement when discussing the district court's application of Guidelines Section 5K2.10 to the facts of this case, and engages in an analysis that leads the Government to conclude that "ordinary victim misconduct" (which has no definition in the law) "is not a mitigating factor" and that since here the victim misconduct is "ordinary" the 5-level downward departure for victim misconduct was illegal!

Here the district court identified three factors that it believed were not, in and of themselves valid grounds for departure standing alone, but in combination did justify a further 3-level downward departure.

Section 3742(e)(2) and (3) are applicable since the resulting sentence was "outside the applicable guideline range." Those sub-sections require the reviewing court to determine whether the sentence was the result of an incorrect application of the sentencing guidelines, and if it is outside the applicable guideline range, whether it was unreasonable, having regard for various factors.

Clearly, although individually, the factors may not have all been permitted bases for departure, two of the three factors – added punishment due to unusual susceptibility to abuse in prison and added punishment due to successive, high visibility criminal prosecutions for the same offense conduct – are neither adequately taken into account by the Guidelines themselves, nor prohibited grounds for departure.[8]

Nor can it be said that these factors fail to meet the purposes of the sentencing law, as required by Section 3742(e)(3)(A). In fact, the three bases for downward

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[8] Arguably, the defendant's lack of danger to the community is, standing alone, a prohibited ground for downward departure since his is in criminal history category I and the Guidelines already assume the lowest level of recidivism in that category. On the other hand, the District Court may have been thinking of non-criminal dangers that the "heartland" offender in a violent assault case might pose to the community. The Court specifically noted the defendant's were not bullies or offensive people in the civilian lives.

departure appear to fit easily into the 4 goals of sentencing the Government considers to be the touchstone of valid departures found in 18 U.S.C. § 3553(a)(2).[9] Subsection 3553(a)(2)(A) includes a goal of "to provide just punishment for the offense." When punishment is harder or more painful, or *more* retributive on one prisoner than another, it is reasonable that it should be shorter for that prisoner, or that it will take less of it to have the same punitive effect. Sub-section 3553(a)(2)(B) refers to deterrence, and it seems logical and reasonable for a District Court to conclude that living in prison with a constant, reasonable, fear of abuse will have a greater deterrent effect than merely living in prison without such a fear. Sub-section 3553(a)(2)(C) involves protection of the public from "further crimes" of the defendant, and to the extent this factor may be considered at all for a first offender, its relationship to deterrence appears to favor

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[9] The Government reads the list as fairly short. At p. 15 of their brief, the Government states:

> "Even if the Commission has not adequately considered a factor, a downward departure is permissible only when it is a 'mitigating' factor, consistent with the purposes of sentencing identified is 18 U.S.C. § 3553(a)(2), *i.e.*, retribution, deterrence, incapacitation and rehabilitation. The question whether a particular departure ground satisfies those statutory requirements is subject to de novo appellate review." (Govt., pp. 15-16).

Petitioner observes that what the government calls "retribution" under sub-section 3553(a)(2)(A) for example, includes the promotion of respect for the law, and to provide for "just punishment." Obviously, being placed by the court in a situation where the prisoner is likely to be the victim of law violations neither promotes respect for the law, nor is "just."

this ground for departure. Finally, sub-section 3553(a)(2)(D), which refers to rehabilitation virtually always favors downward departure, but would tend to favor accelerating the defendant's movement into a half-way house or community confinement center where, presumably, there would be a lowering of the risk of abuse in prison, and thus an increase in the ability of incarceration to be used in an effective rehabilitative manner.

These are clearly the aspects of this case the district court had in mind when bundling three "added punishment" factors into a single, combination ground for downward departure. Yet the government's approach would require reviewing courts to substitute their judgement for trial courts in determining whether such factors, which are non-prohibited (in combination) and which serve the goals of punishment, are "appropriate" in a given case.

Neither Section 3742(e) nor any of this Court's decisions justify such a de novo review, and the requirement of "due deference to the district court's application of the guidelines to the facts" supports the contrary view.[10]

Unless the district court identifies a ground for departure that is prohibited, or that does not serve the purposes of punishment, the circuit court's de novo

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[10] Another way of looking at this issue is this. If the question whether the "application of the sentencing guidelines" was "correct" or not is a question of law in departure cases (*Williams* v. *United States, supra*), then the Section 3742(e)(3) question of whether or not the departure is reasonable in a particular case in view of the goals of sentencing and the reasons of the district court requires the reviewing court to defer.

review will not permit reversal of the departure. Unless the district court's fact finding is clearly erroneous, or its reasoning an abuse of discretion, the circuit court's deference to the district court's application of the guidelines to the facts will require the departure be affirmed.[11]

CONCLUSION

The Government simply exhorts a claimed devotion to eliminating disparity in sentences over the actual goals of the Guidelines and the Sentence Reform Act which include an intent to mete out just punishment, roughly proportionate sentences, and to retain a degree of individualized sentencing, where the district court, with its unique vantage point, identifies unique factors in the case before it which serve the statutory goals of sentencing, and are mitigating factors either specifically authorized by the Guidelines as grounds for departure, or at least are non-prohibited and not otherwise accounted for, or adequately accounted for in the Guidelines.

The circuit court's role is, like the district court's role limited under the Sentence Reform Act.

It reviews de novo the category of departure used by the district court to determine if an error of law was made in considering that ground in the type of case before it. If not, the circuit court must revert to a deferential role, affirming explicit and implicit findings of fact, unless clearly erroneous, and deferring to the district

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[11] Clearly, under *Williams*, a departure is an instance of "the district court's application of the guidelines to the facts."

court's application of the guidelines to those facts (departing) unless the departure is unreasonable, and thus an abuse of discretion.

In the present case the district court did not err as a matter of law in following the plain language of U.S.S.G. § 5K2.10 (victim misconduct) and if the district court's application of that guideline to the facts of this case is given the statutorily mandated "due deference" the 5-level departure therefor will be affirmed. Similarly, since at least two of the three "combination" factors upon which the district court relied are neither prohibited nor accounted for in the Guidelines, and since they serve the goals of sentencing as required by 18 U.S.C. § 3742(e), the district court neither erred as a matter of law in determining it could depart in this type of case on the basis of those combined factors, nor did it abuse its discretion (i.e., act unreasonably) in determining to grant an additional 3-level downward departure.

For all the foregoing reasons, the judgment of the court of appeals reversing the sentence should be reversed.

Respectfully submitted this 28th day of December, 1995.

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